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UNITED STATES SUPREME COURT

October 1998 Term

ERIC DAVENPORT, Petitioner,

vs.

COMMUNITY CORRECTIONS OF THE PIKES PEAK REGION, INC., Defendant.

On Petition for Writ of Certiorari to the Colorado Supreme Court

# PETITION FOR WRIT OF CERTIORARI

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**QUESTIONS PRESENTED FOR REVIEW:**

1. Did the Colorado appellate courts violate the Petitioner's due process rights by immunizing private community corrections in Colorado through a decision that this private industry had no duty to the public?
2. Did the Colorado appellate courts violate the equal protection rights of Eric Davenport as a member of the public by ruling that private community corrections had no duty to the public?
3. Did the Colorado appellate courts exceed their authority and violate equal protection and due process rights of this victim by immunizing private corrections in Colorado by finding that there was no duty to the public based upon financial considerations and policy considerations with no evidence in the record and such finding being contrary to legislative intent in Colorado and contrary to the Colorado Constitution when that industry blatantly violated state law and regulations of its state contracting agency as well as its own regulations?
4. Is the Colorado Supreme Court's decision that private corrections have no duty to the public so fundamentally unfair as to violate substantive and procedural due process?

5. Was the decision of the Colorado Supreme Court which set aside a jury verdict an arbitrary deprivation of property without due process of law thereby violating the Petitioner Eric Davenport's rights to substantive due process of law?

**PARTIES:**

A list of all parties to the proceeding:

1. Eric Davenport
2. Community Corrections of the Pikes Peak Region, Inc.

**TABLE OF CONTENTS:** Page

Questions presented for review: .....i

Parties .....ii

Table of Cited Authorities .....iv

Petition for writ of certiorari .....1

Opinions entered on the case by courts citations of the official reports of below .....1

Statement of the basis for jurisdiction in the United States Supreme Court .....1

The constitutional provisions, treaties, statues, ordinances and regulations involved in the case with appropriate citation are set out in appendix .....2

A concise statement of the case setting out the facts material to consideration of questions presented .....2

Argument .....9

Conclusion .....30

**TABLE OF CITED AUTHORITIES: PAGE #**

*Baumgart v. Grant County*, 750 P.2d 271 (Wash. 1988) .....23, 24, 25

*Collins v. Welsh*, 75 F.2d 894, 99 A.L.R. 1319 (C.C.A. 9th Cir. 1935), Cert. Den. 295 U.S. 762, 55 S.Ct. 921, 79 L.Ed. 04 .....17

*Davenport v. Community Corrections of the Pikes Peak Region*, 942 P.2d 1301 (Colo. App. 1997), affd. at 962 P.2d 963 (Colo. 1998) .....1

*E.B. v. Verniero*, 119 F.3d 1077 (3rd Cir.) .....21

*Halvorsen v. Baird*, 146 F.3d 680 (9th Cir. 1998) .....16

*Honda Motor Co., Ltd. v. Oberg*, 512 U.S.415(1994) .....20

*Leake V. Cain*, 720 P.2d 152 (Cob. 1986) .....23

*Moore v Commonwealth Dept. of Justice*, 538 A.2d 111 (Pa. 1988) .....23

*Pacific Mutual Life Insurance Co. v. Haslip*,499 U.S. 113 (1991) .....19

*Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Scott*, 1329 A. 328, 144 A.L.R. 849 (Pa. 1942) .....17

*Perreira v State of Colorado*,
768 P.2d 1198 (Colo. 1989) .....22, 25

*People v. Zapotocky*, 869 P.2d 1234
(Colo. 1994) .....20

*Reno v. Flores*, 597 U.S. 292 (1993) .....14

*Richardson v. McKnight*, 117 S.Ct.
2100 (1997) .....7,13,14,15

*Romer v. Evans* 226 S.Ct. 1620 (1996) .....11

*Sandin v. Conner*, 515 U.S. 472 (1995) .....21

Section 17-27-105, C.R.S. .....28

28 U.S.C. 1257 .....2

Colorado Constitutional Provisions:

Article III .....20

Article V, Section 25 .....21

Article II .....21

Treatises:

RESTATEMENT (SECOND) OF TORTS
§319(1965) .....22

RESTATEMENT (SECOND) OF TORTS
§315(1965) .....22

16B Am Jur 2d 68, Sections 581-602 .....17,18

**PETITION FOR WRIT OF CERTIORARI**

Eric Davenport, respectfully requests that a writ of certiorari issue to review the judgment and opinion of Colorado Supreme Court in this case.

**OPINIONS ENTERED IN THE CASE BY COURTS CITATIONS OF THE OFFICIAL REPORTS OF BELOW:**

The Colorado Court of Appeals decision is set forth as *Eric Davenport, Plaintiff-Appellee and Cross-Appellant, v. Community Corrections of the Pikes Peak Region, Inc., Defendant-Appellant and Cross-Appellee*, No. 94 CA 1283, 942 P.2d 1301 (Cob. App. 1997). Certiorari was granted by the Colorado Supreme Court September 8, 1997 and the Court of Appeals decision was affirmed by the Colorado Supreme Court in *Eric Davenport, Petitioner v. Community Corrections of the Pikes Peak Region, Inc., Respondent*, No. 97 SC 266, 962 P.2d 963 (Colo. 1998) on June 19, 1998 as modified on denial of rehearing on July 27, 1998.

**STATEMENT OF THE BASIS FOR JURISDICTION IN THE UNITED STATES SUPREME COURT:**

The initial opinion was issued by the Colorado Court of Appeals on January 9, 1997. Certiorari to the Colorado Supreme Court was granted on September 8, 1997. The Colorado Supreme Court issued an opinion on June 29, 1998 affirming the Colorado Court of Appeals decision. The Petition for Rehearing was denied and the decision was modified on July 27, 1998.

This court has jurisdiction to review on a writ of certiorari the judgments in question pursuant to 28 U.S.C. 1257.

**THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE WITH APPROPRIATE CITATION ARE SET OUT IN THE APPENDIX.**

**A CONCISE STATEMENT OF THE CASE SETTING OUT THE FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED:**

This is an appeal from a decision of the Colorado Supreme Court which affirmed the Colorado Court of Appeals wherein a jury verdict was set aside on the premises that a private community correctional facility had no duty to the public, essentially granting the private corporation judicial immunity. The jury verdict was on behalf of Eric Davenport against Community Corrections of the Pikes Peak Region, Inc. (hereinafter referred to as ComCor). The cause of action was for negligent supervision of an inmate who had caused injuries to Davenport. The jury found that the private corporation was 90% negligent and the proximate cause of Davenport's injuries. The verdict was for $1.9 million which included $435,000 for economic losses, $10,000 for disfigurement and $1,468,000 for non-economic losses or injuries. The verdict was reduced to $650,000 because of Colorado's statutory cap on pain and suffering, thereby reducing the $1,468,000 portion of the verdict to

$250,000.

The decisions of the Colorado Court of Appeals and the Colorado Supreme Court reversed a summary judgment which had been entered early in the proceedings by the trial court finding that the private corporation, ComCor, had a duty to the public and to prevent the public from foreseeable harm by its inmates. The Colorado Court of Appeals based its decision not to impose liability upon the financial instability which liability might cause in the private corrections industry. The Colorado Supreme Court affirmed the decision of the Colorado Court of Appeals noting that they did not desire private correctional industries to have to deal with the forseeabilitv in the community of the actions of their inmates or residents. This was despite a contractual obligation of the private industry with the Division of Public Safety to provide 24 hour supervision. The private industry, ComCor, boasted during trial that it, as a private corporation, had no duty to follow the law, the regulations of the Division of Criminal Justice which its contract required or its own regulations. In fact, in this case, the laws of Colorado were defied when the court was not notified of an inmate's violations of the regulations and conditions of placement, thereby placing the public at foreseeable risk. The regulations of the Division of Criminal Justice were not followed. ComCor's internal regulations were not followed. The result was that their inmate continued to

drink and drive and severely injured a member of the community.

In regard to the preservation of the record and raising of federal questions, the issues of duty to the public, equal protection, due process, and a taking in regard to the jury verdict reduction were brought up throughout the proceedings, primarily in the appellate court. In the initial trial proceeding, the trial court ruled at page 279 of the record:

> 1. The Court determines that the cases and legal authorities cited by the Plaintiff are persuasive to the effect that in Colorado, there is a duty upon entities such as the Defendant to exercise reasonable care to protect members of the public from harm caused by persons in the control of the Defendant.
> 2. Based upon the matters submitted to the Court, there are disputed material facts as to the foreseeability of injury and whether or not the Defendant exercised reasonable care.

ComCor never addressed the trial court's ruling regarding duty to the public in its initial briefs, although the Colorado Court of Appeals decision was based upon and reversed the trial court's ruling that ComCor did have a duty to the public. The issue of the private community correctional industry's duty to the public had been initially briefed by Davenport at pages 110 through 257 of the record in the trial court.

In the Answer Brief and Opening Brief

in the Colorado Court of Appeals, Davenport discussed the statutory requisites of the duty to him and the public and also brought up the fact that the reduction of the verdict was a taking of private property without due process of law. Davenport's Cross-Appellant's Reply Brief dealt with the unconstitutionality of imposing a cap on a verdict for noneconomic loss, addressing constitutionality and noting that because of Eric Davenport's disability, he was in a suspect class requiring heightened scrutiny.

The Petition for Rehearing** directed to the Colorado Court of Appeals at page 4 noted that to impose liability on ComCor

> would provide a message to this private organization that it had to follow reasonable precautions including the provisions of its contract, its own regulations, state laws, and the provisions of the regulations of its contracting agency, as well as the dictates of the court. These are due process and equal protection rights for victims such as Eric Davenport.

The Petition for Certiorari to the Colorado Supreme Court specifically addressed the federal questions in the following context as an issue to be considered:

> Is the action of the Court of Appeals in giving a private entity immunity unconstitutional as a denial of due process, equal protection, a taking, and a violation of the separation of

powers?

In the Opening Brief of the Petitioner to the Colorado Supreme Court, this Petitioner discussed equal protection, due process and taking issues in a section entitled "Constitutionality and Sovereign Immunity Problems" at pages 25 through 30** noting the distinctions of this case with the cases of other states noting that the grant of immunity by the Court of Appeals denied the public and this victim of equal protection and that the grant was without a rational basis. The brief discussed the violation by the Court of Appeals of the separation of powers and the direct violation of the Colorado constitution. The summary of argument in that brief stated as follows:

> The Court of Appeals erred in holding that a private corrections facility owed no common law or statutory duty to the public for the actions of its offenders. The Court of Appeals decision is judicial legislation which unconstitutionally immunized private community corrections thereby violating equal protection, due process, and becomes a taking, defying the concept of separation of powers.

ComCor's Answer Brief never addressed any of these concerns or issues.

In the Reply to Amicus Curiae Brief of Colorado Community Corrections Coalition, Community Corrections Services, Inc., and Adams Community Corrections Program, Inc., in the Colorado Supreme Court. public policy

and history issues were discussed in the context of *Richardson v. McKnight*, 117 S.Ct. 2100 (1997).

In regard to the facts of the case, the Petitioner, Eric Davenport, was severely injured in an automobile accident on January 14, 1989 in Colorado Springs. Colorado. He was the passenger in a car driven by Fred Rutledge, an inmate at the Community Correctional Facility of the Pikes Peak Region. At the time of the accident, Rutledge was out on a weekend pass driving his car, which was uninsured, and was intoxicated. This was not the first incident in which Rutledge had been driving while intoxicated during and previous to his stay at ComCor. Rutledge committed numerous other program violations in his less ten months at ComCor involving substance abuse and driving.

Alcohol and substance abuse were clearly noted in Rutledge's background prior to admission to ComCor. In its intake report, ComCor personnel noted Fred Rutledge's propensity for alcoholism and placed an "alcohol alert" on his file. ComCor acknowledged Rutledge's substance abuse problems in the treatment plan designed by ComCor which included mandatory Antabuse, therapy and attendance of Al-non meetings. ComCor records revealed a total of nine (9) infractions by Rutledge involving alcohol and drugs during his ten (10) months at ComCor, not including the January 14, 1989 automobile accident. In addition, Rutledge at his sentencing was

placed at ComCor for burglary, the non-violent crime, and placed on probation for the violent crime which included using his vehicle as a weapon while he was intoxicated injuring other persons. Judge Railey, the sentencing judge, had noted that the ComCor and probation were to work together with ComCor to be the responsible party. ComCor accepted Rutledge for 'treatment'.

The most blatant violation by Rutledge prior to the January. 14, 1989 accident occurred on September 20, 1988. A ComCor incident report documented Fred Rutledge driving his uninsured car erratically with several other inmates in the car. A subsequent breathalyzer analysis administered by ComCor revealed Rutledge's blood alcohol content to be .27 and ComCor officials acknowledged that no one, including the judge or his probation officer, was alerted. He was also written up for reckless driving on another occasion. Rutledge had no drivers license and had presented an insurance card which showed him insured for only one day. Rutledge substituted aspirin for Antabuse. All of these problems were because ComCor did not follow regulations or the law.

Davenport's action for negligent supervision of Rutledge resulted in a jury verdict finding ComCor negligent. ComCor's failure to notify the court and Rutledge's probation officer of Rutledge's numerous incidents involving alcohol, marijuana, and other drugs, the failure to follow the

treatment plan devised by ComCor which set forth condition of his placement and ComCor's failure to follow state law, regulations of ComCor and the Division of Criminal Justice and their own contract all led up to the accident, resulting in injury to a member of the public, Eric Davenport.

In an appeal initiated by ComCor the verdict was reversed. ComCor was effectively granted quasi-judicial immunity by the appellate courts when the case was dismissed. The Court of Appeals ruled that this private correctional facility owed no duty as a matter of law to protect any member of the public from the actions of any of its inmates. The Court of Appeals based this decision upon financial considerations and noted that they did not believe that this accident was foreseeable, ignoring the many program and law violations and the facts. This decision effectively gives immunity as a matter of law to all private correctional facilities.

The Colorado Supreme Court affirmed the decision of the Colorado Court of Appeals, ruling that the private correctional facility had no duty to the public because the Supreme Court did not want community corrections private industries to have to deal with foreseeability of what their inmates would do to members of the public.

**ARGUMENT**

The Court of Appeals and Colorado Supreme Court in this case made a decision that ComCor had no duty to this victim "or

any other member of the public." The Court underlined the part of the legislation providing in the mission statement that Community Corrections organizations is "to provide for public safety". However, the decisions of the Colorado Appellate Courts create a special classification of a private industry which jeopardizes the safety of the public. Their decisions are contrary to both the federal and state constitutions and are without any rational basis. The rights of the members of the public are taken away by these decisions which deny Eric Davenport and all members of the Colorado public due process and equal protection. These decisions take away a verdict which was given to Davenport, now a disabled member of society, by a jury, not for punitive damages, but for actual damages.

An equal protection analysis requires that policy matters are considered. The public has a right to expect that they will be protected from crimes of residents of community corrections facilities, especially when the residents are incarcerated for those types of crimes or have such a criminal history. The legislative goals of privatization of community corrections is to "balance the needs of the stakeholders." Public policy and common sense would require that members of the public, such as Eric Davenport or any other victim of foreseeable criminal activity, are among the stakeholders. This is especially true when the inmates of ComCor are

in a custodial situation which is for offenders who have already injured society and committed crimes where prison, not jail, is the alternative. The impact of these decisions would be to allow the ComCor inmates to continue to offend throughout their sentence period with no liability to the public and to encourage ComCor not to follow rules, regulations and state laws.

Community corrections is increasing at an alarmingly pace placing thousands of criminals each year in direct contact with the public. Colorado has enacted legislation which would eventually privatize all or most of corrections. These decisions would give that industry immunity not available to even the jailor or warden of state institutions. Finding that there is no duty to the public denies the public and Eric Davenport of equal protection of the laws. The Colorado Supreme Court and the Colorado Court of Appeals need to heed the dictates of *Romer v. Evans*, 226 S.Ct. 1620 at 1628 (1996):

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

The decisions to create a special

classification for private community corrections and immunize them to the detriment of the public and their criminals' victims is a denial of equal protection. As was indicated in *Romer, supra,* at 1628 "protection of the laws is a pledge of the protection of equal laws." Now is the time for this Court to consider the public policy implications of community corrections and to delineate that there is a duty owed to the public and to protect their due process and equal protection rights.

Through this decision the Colorado Court of Appeals and Supreme Court have so far departed from accepted and usual course of proceedings by usurping and contravening legislative policy and intent that the due process rights of Eric Davenport and all victims of private corrections who are members of the public have been and will be violated. All of our citizens, and especially members of the public who desire to live in an ordered society free from fear of victimization, have a liberty interest in seeing that the state, especially through our courts, does not flout the law depriving us of our constitutional rights to be safe in our homes and society. These decisions, through court actions, have been violations of equal protection and due process for every member of the public as well as Eric Davenport. As was noted in *Weiler v. Purkeit*. 137 F.3d 1047 at 1051 (8th Cir. 1998):

> Substantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept or ordered liberty.... [cites omitted] There are two different ways of stating a substantive due process claim. First, the state violates substantive due process when it infringes "fundamental" liberty interests, without narrowly tailoring that interference to serve a compelling state interest.... [cites omitted] Second, the state violates substantive due process when it engages in conduct that is so outrageous that it shocks the conscience or otherwise offends "judicial notions of fairness, [or is] offensive to human dignity.

This case reeks of the failure to limit the favoring of one class to the detriment of the injured and the public. Not only have the Colorado Courts violated due process by finding a compelling state interest, i.e. immunizing private corrections, without any facts or basis in the record, but they have created a special class which they are favoring for no valid reason. As was discussed in *Richardson, supra,* there is no tradition which is so rooted in tradition to justify granting this private industry immunity. Eric Davenport and any member of the public has a right to rely on being compensated for wrongs

which are done to them by private correctional industry's negligent supervision. Substantive due process forbids government from infringing on fundamental rights which are

> liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292 (1993)

The liability of a private business entity, whether a business which contracts with state agencies or otherwise, has not been limited through legislation in Colorado. Community Corrections did attempt to limit liability of private Community Corrections in Colorado since this verdict was rendered in 1994. However, all of these attempts were defeated. The rulings in this case are couched in the language of duty. However, by taking foreseeability out of and making it a precedent to the duty analysis, these decisions of the Colorado Supreme Court are creation of quasi-judicial immunity for a private lucrative corporation in Colorado. These courts decisions are beyond their authority, lack substantial basis required by the police power, lack the historical foundation for grants of private immunity, thereby violating substantive due process and equal protection of the laws. Immunity should not be extended to private businesses through case law without a strong historical tradition. Such an action is un-

constitutional as a denial of due process and equal protection. This decision is a taking of private property as well as contrary to case law and public policy throughout the nation and especially in Colorado.

This decision conflicts with recent dictates and case law of the United States Supreme Court. Immunity granted by courts to private corrections organizations was rejected in the recent case of *Richardson v. McKnight, supra*. The *Richardson* case was ignored by the Colorado Supreme Court. This United States Supreme Court in *Richardson* indicated that there was no historical or practical basis for giving private community corrections immunity. The *Richardson* case has been followed throughout the United States. Although it was cited in the briefs and argument of this case, the Colorado Supreme Court chose not to mention it. Any distinctions between the *Richardson* case and this case are not material enough to justify departure from the rationale or ruling of that case. There is no good reason to give private community corrections immunity, whether it be by claiming no duty to the public or otherwise. The public has a right to be protected from foreseeable actions of inmates, especially when various regulations and state laws are designed to prevent the very harm which occurred to Davenport. There is no other case in the nation which has declared that a private correctional industry will have no duty to the public when laws and regulations are blatantly violated. The

*Richardson* agency was for-profit and ComCor is not-for-profit. As was noted in *Halvorsen v. Baird*, 146 F.3d 680 at 686 (9th Cir. 1998):

> That difference is not material, because both profit and nonprofit firms compete for .. . [public] contracts, and both have incentives to display effective performance. That revenues may go to salaries and other activities of the firm, as opposed to dividends, is not likely to dampen the ardor of the nonprofit firm's employees.

The decisions of the Colorado courts have deprived Eric Davenport of property rights without due process of law. The District Court reduced the $1.9 million verdict to $625,000 because of a statutory cap on damages occasioned by pain and suffering. The Colorado Court of Appeals eliminated the verdict by determining that private corrections in Colorado would have no duty to the public because of the potential impacts on the financial stability of that private industry. The Colorado Supreme Court upheld the decision of the Colorado Court of Appeals indicating that to impose a duty to the public upon private corrections would require the private corrections industry to deal with the foreseeability of actions of their inmates, a responsibility which the Colorado Supreme Court did not want to impose upon private correctional industries. None of the decisions to reduce or eliminate Davenport's verdict were based upon any ex-

ceptional needs of the public or any rational exercise of the police power. Thereby, these decisions have deprived Eric Davenport of property rights without due process of law. These decisions are not in accord with either federal or state law and should be reviewed by this Court.

The rights of Eric Davenport to the verdicts determined by a jury for compensatory damages are property rights which should not be taken away by state action, i. e. court or legislative decision, without due process of law. The property rights acquired by a judgment through a verdict are property rights which cannot be taken away from a citizen without due process of law. The right to use and maintain private property without state interference is a fundamental right. This right is protected by both state and federal constitutions. The Fourteenth Amendment of the Federal Constitution prevents deprivation of private property by state action without due process of law.1 Whether a state has acted in such a manner to deprive a person of property without due process of law so as to constitute a

1. See Section 600 of Constitutional Law, 16B Amiur 2d at 68 citing *Collins v. Welsh*, 75 F.2d 894.99 A.L.R. 1319 (C.C.A. 9th Cir. 1935), cert. Denied, 295 U.S. 762, 55 S. Ct. 921, 79 L.Ed. 04 (1935); *Pennsylvania Co. For Insurances on Lives and Granting Annuities v. Scott*, 346 Pa. *1329* A.2d 328, 144 A.L.R. 849 (1942).

"taking" and violate that person of constitutional rights depends on a variety of considerations. The purpose of the procedure must be considered. The effect upon the person's rights must be taken into account as well as all of the surrounding circumstances which would render the action appropriate. A property owner, such as Eric Davenport, only has a constitutional right to possess property subject to the limitations of the police power of the state. The state, through legislation or court determination, has the right through the police power to limit or take away property rights if those unfettered rights endanger or threaten the health and safety of the general public. The state has the right to reasonably regulate property rights to promote and protect the general welfare so long as due process dictates of state and federal constitutions are met.2

The jury verdict of Eric Davenport was taken from him through the decisions of the Colorado Court of Appeals and the Colorado Supreme Courts. However, these decisions do not comply with due process requirements. The deprivation of Davenport's jury verdict is both a procedural and substantive due process and equal protection problem. In order for a person to have their property rights taken from them by state action such as legislative or court action, there must

2. See generally the discussion set forth in Sections 581 through 602 of Constitutional Law. 16B Am Jur.2d pages *38-69*.

be due process of law. A 'taking' or limitation of a property right through state action can only be justified through a valid exercise of the police power. The only justification of the Supreme Court in reversing liability of Community Corrections of the Pikes Peak Region was that they' would not impose any duty by ComCor to members of the public because of potential financial impacts. ComCor never presented one iota of evidence in either the trial court or the appellate courts as to financial impacts of liability to the public. The Colorado Supreme Court added to the 'taking' by indicating that they would impose no duty to the public on ComCor because they did not want private community corrections to have to deal with foreseeability of their inmates actions. Both of these appellate courts have used unfettered discretion to find there was no duty to the public in Colorado for private community corrections. This discretion is not allowed by either Colorado law or Colorado constitution. Their actions cross the line into the area of constitutional impropriety because both decisions lacked objective criteria.3 Neither the Colorado Court of Appeals nor the Colorado Supreme Court provided any rationale which was sup-

3. 'See *Pacific Mutual Life Insurance Co. v. Haslip,* Ill S.Ct. 1032 *at* 1046, 499 U.S. 1, 113 Led.2d 1(1991). Although dealing with punitive damages, the *Haslip* decision sets forth the requirements of procedural due process.

ported by the record to depart from traditional practice and procedures. The observations of *Honda Motor Co., Ltd V Oberg*, 114 S.Ct. 2331 at 2339, 512 U.S. *415* (1994) are appropriate in regard to due process analysis where "traditional practice provides a touchstone for constitutional analysis." As the *Oberg* Court went on to hold

> The deprivation of property without observing (or providing a reasonable substitute for) an important traditional procedure for enforcing state-prescribed limits upon such deprivation violates the Due Process Clause.4

This case involves Colorado's appellate courts making decisions which abrogated a jury verdict which defied state-prescribed limitations of both the Colorado constitution and legislature. Colorado's constitution in Article III provides for a separation of powers of the legislative, executive and judiciary branches of government.5 In this case, the Colorado appellate courts have effectively deprived Eric Davenport of his right to a jury verdict by immunizing private corrections in Colorado through a decision which finds no duty to the public

4. See *Honda Motor Co., Ltd V Oberg. supra,* at 114 S.Ct. 2331 at 2342.
5. See *People* v. *Zapotocky,* 869 P.2d 1234 (Colo. 1994) which discusses the distinctions of the three branches and the proscription against the courts deciding a case by exercising legislative or executive power.

for private corrections. This judicial action was despite a continued refusal of the legislature to immunize private community corrections. This judicial action, which included findings made by the Colorado Court of Appeals and speculations by the Colorado Supreme Court that any liability to the public by private community corrections would make the industry financially unstable, was without any evidence of financial problems in the correctional industry. The people of Colorado have been assured in their state constitution that there will not be any special treatment for private industry. Article V, Section 25 of the Colorado Constitution clearly states:

> The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say:.. . granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever.

By making a decision not based upon legislation or facts, the Colorado appellate courts have violated Article II, Section of the Colorado Constitution which provides:

6. 'See *E.B.* v. *Verniero*. 119 F.3d 1077 at 1 105(3rd Cir. 1997) noting that "liberty interests that trigger procedural due process may be created by state law or by the federal constitution itself." Citing *Sandin* v. *Conner*, 515 U.S. 472, 115 S.Ct. 2293. 132 L. Ed.2d 418 (1995).

Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.

The dictates of substantive due process include the requirement that state laws and rights will be followed by state agencies such as our courts.6 Every citizen should be able to rely on their state courts not to violate their constitutional rights and not to take property, such as a jury verdict, through a court decision which is not based upon facts or traditional notions and history of common law. This 'taking' through judicial decision interferes with rights which are implicit in the concept of ordered liberty. The Colorado appellate courts have violated substantive due process.

The Court of Appeals and the Colorado Supreme Court have picked a private industry to immunize at the expense of the public. They have misapplied common tort principles involving duties owed to reasonably control the acts of third party tortfeasors. While it is the exception that a party is responsible for the negligent acts of others, liability will be found where such party takes charge of another who poses a risk or where a *special relationship* exists between the actor and the party. See RESTATEMENT (SECOND) OF TORTS § 319 *(1965);* RESTATEMENT (SECOND) OF TORTS § 315 (1965) cited *with approval in Perreira V. State of Colorado.* 768 P.2d 1198 (Cob. 1989); *Taco Bell. Inc.*

*v. Lannon*, 744 P.2d 43 (Colo. 1987); *Leake V. Caln* 720 P.2d 152 (Cob. 1986). This decision is denies the public of the traditional principles of tort liability. There was foreseeability and a duty to protect the public. They cannot be separated. This has become even more clear in the current legislation regarding Community Corrections.

The Court of Appeals did not find the custodial relationship of ComCor to Rutledge to be a special relationship. The Court of Appeals seems to have relied more upon inapposite authority from sister states based upon notions of sovereign immunity rather than a careful consideration of public policy applying the precedents of this Court. *Baumgart v. Grant County*, *50* Wash. App. 671, *750* P.2d 271 (1988); *Moore v. Commonwealth Department of Justice*, 114 Pa. Cmwlth. 56. 538 A.2d 111(1988)

Granting immunity to a private entity without specific reasons set forth by the legislature is a violation of due process. No private entity which openly violates the law and regulations, prior to this case, has been granted quasi-sovereign immunity or other immunity. The Court of Appeals relied on the *Baumgart* case to attempt to create immunity as a "matter of law" for private community corrections organizations pointing to the cost of liability to such entities as the deciding factor. There was no evidence, in the record, only supposition in briefs, showing that liability would be a financial burden. The *Baumgart* court was dealing with

an inmate who had spent a few days in jail as a punitive measure, i.e. "the custody was simply punitive incarceration" at page 274, not an inmate who had been sentenced to ComCor as therapeutic and safety 'to the public' issues. The *Baumgart* court indicated that this was not a situation of failure to enforce' and found that there was no liability as a "matter of law", noting that this was not a situation where regulations had not been followed. Here the Court of Appeals ignored the duty of ComCor to follow and enforce its regulations, the treatment plan imposed by the court and by their own acceptance letter, and the facts, including ComCor's 24 hour contractual supervision duty. In this case, the cause in fact was directly related to ComCor's blatant violation of state laws, the regulations of the Division of Criminal Justice, the reason for the incarceration as well as the failure to follow the treatment plan. Probation, the sentencing judge and Rutledge felt that this was an accident waiting to happen. Merely following rules, whether these rules be regulations or state laws, and the judge's orders would have prevented this accident. Recognizing ComCor's liability would accord due process to the public and to Davenport.

The inmate who injured Davenport was placed in a concurrent supervision situation by Judge Railey for his alcohol related offenses which were noted by the judge, the probation officer, ComCor's own "alcohol alert". That inmate continued to violate

the rules of ComCor engaging in various episodes of drinking, not going to counseling, not taking Antabuse, and even driving with a 2.7 blood alcohol content with two inmates less than three months prior to the incident of drinking and driving with Davenport in this tragic incident, all culminating in the episode for which the jury imposed liability. Reliance on *Baumgart* is not only misplaced, but public policy, common sense, justice and the particular facts of this case dictate that this should not be the law in Colorado or elsewhere. This case is contrary to case law across the country.

The Court of Appeals indicated that ComCor as

> Rutledge's custodians also were less well-equipped to diagnose his potentially dangerous propensities than were the psychiatrists in Perreira...

and that Rutledge did not

> display any bizarre, violent, or aberrant behavior that would set him apart from numerous other community corrections residents with substance abuse problems.

The Court of Appeals ignored the fact that ComCor is and holds themselves out as a "treatment facility" and the actual violations of Rutledge himself. Prior to admission to ComCor, Rutledge was interviewed by ComCor social workers. The ComCor social workers specifically noted Rutledge's past impulse control problems with respect to alcohol and other substances and were aware of

his criminal past. Further, ComCor social workers were aware that at least two of Rutledge's past criminal incidents were alcohol-related. ComCor social workers knew in particular, on one occasion Rutledge was intoxicated and rammed his car into another vehicle. The fact that Rutledge, while at ComCor, had driven a vehicle when he had a 2.7 blood alcohol content without insurance with two inmates as passengers should have been enough for ComCor to know that an accident like this would have happened and that there would be no other recourse for the victim The Court of Appeals ignored the violations and the history of Rutledge in ruling that the linkage between ComCor's negligent conduct and the later automobile accident was too attenuated for us to conclude that Rutledge's conduct and Davenport's injuries were reasonably foreseeable to Pikes Peak.

The safety of the Colorado public requires that insured private correctional facility not be given immunity as a matter of law without any fact finding by the legislature or even in the trial court. Correctional facilities such as ComCor have been in existence in Colorado for approximately twenty (20) years. At present, correctional facilities like ComCor offer several different types of inmate services, including diversion, transition, and work release. Both diversion and transition programs are primarily residential and require twenty-four (24) hour supervision of the inmate by con-

tract. ComCor offered and continues to claim to offer all of these services. At the trial ComCor claimed that they were a treatment facility. Rutledge had been sentenced to ComCor's diversion program in April of 1988.

The public policy import of this case is demonstrated by the increase of community correctional facilities nationally in recent years. There are approximately twenty two (22) such facilities operating in Colorado offering varying programs. These facilities are responsible for the supervision of over 1,200 inmates at any given time. However, when the length of the average inmate stay at a community correctional facility is factored in, community correctional facilities are responsible for supervision of over 3,200 inmates during a calendar year. Private community correctional facilities will be utilized more in future as the total inmate population continues to grow. The public exposure to these criminals and more violent criminals can be anticipated to double within seven years.

Community correctional facilities are funded by a variety of sources. ComCor received nearly $2.8 million in 1996 from the Department of Corrections. However, that represented less than one-half of ComCor's gross revenues. ComCor receives millions more in payments from the inmates and federal funds. These facts were presented by the Petitioner in the Supreme Court and were essentially unrebutted by ComCor. There were no facts set forth in the trial court.

With a sentence to the prison without

diversion to a community correctional facility, an inmate would be under twenty-four (24) hour supervision and pose no risk to the public. Under those circumstances, the primary purpose of corrections is served, e.g. the threat posed by the criminal offender to the public is neutralized. Obviously the inmate cannot harm the public while in prison and the strict regimentation attached. The public is safe from the harm posed by the inmate given these procedural safeguards.

If the inmate bypasses prison and enters programs like ComCor as Rutledge did, the procedural safeguards for maintaining public safety must be enhanced in ways other than incarceration. This is possible through emphasis of rehabilitation over retribution and education of the inmate over deterrence. However, the safeguards necessary to adequately supervise inmates focus on a fastidious adherence to program rules and regulations, most importantly compliance with alcohol treatment plans. To safeguard the public, strict construction should be given to procedural safeguards requiring community correctional facilities to inform the referring authority of inmate rules violations. See Section 17-27-105, C.R.S.

To safeguard the public further in instances where the inmate will not be incarcerated in prison under twenty four (24) hour supervision, the community correctional facility should strictly adhere to the inmates plan of treatment. Most ComCor inmates have a plan of treatment to address substance abuse problems and staffing of qualified individuals is touted in ComCor marketing aimed at getting offender referrals. All of

the data which ComCor provides details that substance abuse is nearly expected of the inmates. ComCor, as the largest community corrections facility in Colorado, provides intervention and treatment services.

Therefore, because of the statistics that ComCor itself acknowledges, ComCor cannot claim surprise that its inmates will attempt to skirt rules against alcohol consumption and other forms of substance abuse. At ComCor, fully 85% of all residents have substance abuse problems. Additionally, inmate referrals and intakes contain extensive information regarding past substance abuse. In the instant matter, ComCor had all of the information necessary to determine that Fred Rutledge posed a risk to the public of drinking and driving on the date of his admission. Nonetheless, the Colorado Court of Appeals and Colorado Supreme Courts denied Eric Davenport of his equal protection and due process rights and took away a verdict to compensate him only for injuries without due process and equal protection.

**Conclusion**

WHEREFORE, the Petitioner Eric Davenport would request that this court accept this case for Certiorari and reverse the decisions of the Colorado Supreme Court and the Colorado Court of Appeals and reinstate the full verdict of the jury.

Respectfully submitted this 18th day of February, 1999.

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